Supreme Court, U.S.
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No. 04-489

IN THE

Supreme Court of the United States

BROWARD YACHTS INC., A FLORIDA CORPORATION,
Petitioner,

v.

THE VESSEL, KNOWN AS DESTINY HULL NO.104, ITS ENGINES, TACKLE, FURNITURE, APPAREL, GEAR, EQUIPMENT, AND ALL OTHER THINGS THEREUNTO APPERTAINING AND BELONGING, *IN REM*, AND SEAGROVE TRADING, INC., A DELAWARE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether admiralty jurisdiction applies to a claim for a maritime lien on an uncompleted yacht that has traveled through navigable waters.

PARTIES TO PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14.1(6) and 29.6, Petitioner Broward Yachts, Inc. ("Broward Yachts") hereby certifies that there is no parent or publicly held company that owns 10 percent or more of any of Broward Yachts' stock. Additionally, all parties are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Broward Yachts, Inc. ("Broward Yachts") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals below is unpublished and is listed as *Broward Yachts, Inc., a Florida Corporation v. The Vessel known as Destiny Hull No. 104, et al.*, No. 03-13669, May 3, 2004. (App. at A1-7). The opinion of the District Court below is unpublished and is listed as *Broward Yachts, Inc., a Florida Corporation v. The Vessel*

known as Destiny Hull No. 104, et al., No. 03-60304-CV-PAS, May 24, 2003. (*Id.*, at A6-16).

JURISDICTION

The Court of Appeals below entered its judgment on May 3, 2004. Timely Motions for Rehearing pursuant to Fed. R. App. P. 40 were filed on May 24, 2004. Those Motions were denied by the Court of Appeals below on July 13, 2004. (*Id.* at A17). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Statutes at issue in this case are the General Provisions Title of the United States Code, 1 U.S.C. § 3, which established a definition for what constitutes a "vessel," and 46 U.S.C. § 31301, *et seq.*, the Federal Maritime Lien Act, which provides for maritime liens to those who furnish necessaries to a vessel.

STATEMENT OF THE CASE

A. Statement of the Facts

Broward Yachts is the owner of a mega-yacht manufacturing business in Dania Beach, Florida. (*Id.* at A2). Broward Yachts provided wharfage and storage to a 104-foot yacht known as Destiny Hull No. 104 (the "yacht"), which was owned by Seagrove Trading, Inc. ("Seagrove"). (*Id.*).

The yacht manufacturer, Destiny Yachts, L.C. ("Destiny"), was forced to move the yacht to Broward Yachts' facility after it was substantially constructed because of financial problems. (*Id.*).

Destiny entered a license agreement with Broward Yachts to allow Destiny to work on vessels at Broward Yachts' facility. (*Id.* at A3). There

was no finding that Broward Yachts was part of the contract to complete construction on the yacht.

After the license agreement was executed, the yacht was towed on navigable waters approximately six miles to the Broward Yachts facility. (*Id.*). The District Court found that the yacht was 60 to 70 percent complete as a luxury yacht because a number of items had not been installed or connected. (*Id.*). Destiny failed to pay for storing the yacht and Broward Yachts filed an *in rem* admiralty action against the yacht seeking a lien for unpaid wharfage and storage costs. (*Id.* at A4).

B. Proceedings Below

The *in rem* admiralty action was filed in the United States District Court for the Southern District of Florida, and sought unpaid wharfage and storage costs. Broward Yachts maintained that the District Court had admiralty jurisdiction because there was a maritime lien against the yacht.

Seagrove moved to dismiss the action on the grounds that the yacht was not completed and, therefore, not subject to admiralty jurisdiction. The District Court granted Seagrove's Motion. Broward Yachts appealed the decision to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the District Court's decision, relying on *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242 (1920), wherein this Court established the rule that contract rights arising from a contract to complete construction of a vessel are not within admiralty jurisdiction.

Broward Yachts had no contract with the yacht owner and did not take part in the yacht construction process. The Eleventh Circuit, however, held that the broad statutory definition of vessel under 1 U.S.C. § 3 did not apply because the vessel was only a "partially completed hull," regardless of the fact that it otherwise met all the requirements of a "vessel."

C. The Federal Maritime Lien Act and the Definition of Vessel.

The Federal Maritime Lien Act provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel" that may be enforced by a civil action in rem. 46 U.S.C. § 31342. The term "necessaries" is defined as including "repairs, supplies, towage, and the use of a dry dock or marine railway." 46 U.S.C. § 31301(4). Storage constitutes a valid basis for seeking a maritime lien against a vessel under the Act. *See, e.g., Loginter S.A. Y Parque Indus. Agua Profunda S.A. Ute v. M/V Nobility*, 177 F.Supp.2d 411 (D. Md. 2001) (maritime lien against vessel arose pursuant to Federal Maritime Lien Act where dockage services ordered by charterer of the vessel, through its agent, were not paid).

Congress defines a "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation by water." 1 U.S.C. § 3 (emphasis added). Congress intended the word "vessel" to be construed in its broadest possible sense. *See McCarthy v. The Bark Peking*, 716 F.2d 130 (2d Cir. 1983); *Trinidad Corp. v. American S. S. Owners Mutual Protection & Indem. Assoc.*, 229 F.2d 57 (2d Cir. 1956). For example, a vessel retains its character even though it is transported by another vessel as cargo. *See Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91 (1st Cir. 1982)(vessels being transported as cargo do not lose status as vessels). Dredges, barges and even a navy bombing target capable of being towed in navigation can be a "vessel" within admiralty jurisdiction. *See Campbell v. Loznicka The Scorpio*, 181 F.2d 356, 359 (5th Cir. 1950)(and cases cited therein).

REASONS FOR GRANTING THE PETITION

Broward Yachts recognizes that the Supreme Court is not primarily an error correcting Court. Stern, Gressman, Shapiro and Geller, Supreme Court Practice 162-164 (BNA 7th Ed. 1993). However, the Supreme Court often will grant Certiorari where the decisions of two or more Federal Courts of Appeals are in conflict and has lead, and will continue to lead, to confusion among the lower courts concerning important issues of Constitutional Law or Federal Law. *Id.* at 168-193.

The existence of the clear split among the Circuits regarding the issue herein warrants the invocation of this Court's Certiorari Jurisdiction. The split has resulted in inconsistent interpretations of Federal Statutes and is likely to cause great confusion. Moreover, the issue at stake herein involves vital questions of Federal Law and this Court's precedent, as to which there have been confusing and differing judicial responses.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM A NUMBER OF OTHER CIRCUIT COURTS OF APPEALS INTERPRETING 1 U.S.C. § 3.

The Eleventh Circuit's decision conflicts with at least two precedents from other Circuits broadly interpreting Congress' definition of what constitutes a "vessel," *McCarthy v. the Bark Peking*, 716 F.2d 130 (2nd Cir. 1983) and *Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir. 1982).

In *McCarthy*, the Second Circuit held that a ship preserved as an artifact in a museum constituted a vessel under 1 U.S.C. § 3 because it was capable of being towed in navigation. The vessel in *McCarthy* was a museum piece preserved in New York's South Street Seaport Museum. The museum piece had not been put to sea in half a century and her rudder was welded in place. An injured museum worker sued the museum piece in admiralty and the museum under the Longshoreman's and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq.*

The museum claimed that the LHWCA did not apply because the museum piece did not constitute a "vessel." The Second Circuit rejected this argument because it incorrectly limited the definition of vessel under 1 U.S.C. § 3.

Unlike the Eleventh Circuit in this case, the Second Circuit correctly interpreted the broad language of 1 U.S.C. § 3. The Second Circuit noted that a vessel merely needed to be *capable of being used* as a means of transportation on water. The Second Circuit observed that federal courts regularly have applied the definition of "vessel" in 1 U.S.C. § 3 to a variety of contrivances that are capable of seagoing transportation and that even the "hypothetically plausible possibility" of being used as a means of transportation is sufficient.[1]

Thus, in light of the expansive scope of 1 U.S.C. § 3, the Second Circuit concluded that despite the museum piece's welded rudder, and that it "may be fated to ride at anchor for the rest of her days," it still was capable

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[1] *McCarthy*, 716 F.2d at 134, *citing Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F.Supp. 987, 989 (S.D.N.Y.1979) (houseboat capable of being towed from one location to another viewed as analogous to a "dumb barge" and held therefore to be a section 3 vessel for purposes of admiralty and maritime jurisdiction); *Miami River Boat Yard, Inc. v. 60' Houseboat*, 390 F.2d 596, 597 (5 Cir.1968) (powerless houseboat held to be a "vessel"); *M/V Marifax v. McCrory*, 391 F.2d 909, 910 (5 Cir.1968)(decommissioned Navy ship that was in "moth ball fleet" for fifteen years, but which was capable of being used in navigation was a "vessel" subject to a maritime lien enforceable by a suit in rem); *Luna v. Star of India*, 356 F.Supp. 59, 63-66 (S.D.Cal.1973)(historic ship in use as part of a maritime museum held to be a "vessel" because she was "capable of engaging in maritime transportation, if only as a towed craft"); *The Showboat*, 47 F.2d 286, 287 (D.Mass.1930) (sustaining maritime lien for services and supplies against schooner tied to a wharf and used as a restaurant because it was capable of being used as a means of transportation on water and satisfied definition of "vessel" under 1 U.S.C. § 3).

of being towed in navigation and therefore constituted a "vessel." *McCarthy*, 716 F.2d at 135.

Similarly, the Fifth Circuit in *Burks* applied 1 U.S.C. § 3 to a barge that was incapable of self-propulsion and determined that it was a vessel because it was towed into navigable waters. The barge in *Burks*, was equipped to discharge bulk cargo, such as grain from other barges, directly onto oceangoing vessels. To perform its unloading operations, the barge was towed into the Mississippi River and tied to the side of a receiving vessel.

When a worker was injured on the barge, the Fifth Circuit was required to determine whether the barge constitutes a vessel. The Fifth Circuit, relying on precedent from this Court, applied 1 U.S.C. § 3 and noted that even an object with no means of self-propulsion came well within the broad definition for a vessel because it was capable of being used as a means of transportation on water. The Court wryly noted that under 1 U.S.C. § 3:

> No doubt three men in a tub would also fit within our definition, and one probably could make a convincing case for Jonah inside the whale.

Burks, 679 F.2d at 75.

The Eleventh Circuit's decision below conflicts with *McCarthy* and *Burks*. In this case, the substantially completed yacht had been towed through navigable waters. This made the yacht as much a "vessel" as the museum piece in *McCarthy* and the barge in *Burks*. There is no logical distinction between the watercraft in these cases that would allow for one craft to come within the broad definition of 1 U.S.C. § 3, but not the others. Consequently, the yacht in this case satisfied Congress' broad definition of a "contrivance used, or capable of being used, as a means of transportation by water." 1 U.S.C. § 3.

The Eleventh Circuit below apparently ignored the broad definition of "vessel" under 1 U.S.C. § 3 and erroneously applied a limited exception to admiralty jurisdiction for certain construction contracts. The exception was created by this Court in *Thames*. *Thames* holds that "a contract for the complete construction of a ship or supplying materials therefor is non-

maritime and not within admiralty jurisdiction." *Thames*, 254 U.S. at 243. *Thames* involved the claims of parties who entered contracts for the construction of a ship. This Court noted that where the rights of a claimant arise from a contract to construct a vessel, there will be no admiralty jurisdiction, regardless of whether the vessel travels through navigable waters. The *Thames* doctrine, however, never has been applied to third-parties, such as Broward Yachts, whose rights do not arise from a construction contract. Therefore, in addition to the split in Federal Circuits created by the Eleventh Circuit's decision, this Court should accept jurisdiction to correct this clear error and misapplication of its prior ruling.

The upshot of the Eleventh Circuit's decision is a complete distortion of admiralty jurisdiction. Admiralty jurisdiction may be based on contract, tort or on distinctive admiralty actions such as for a maritime lien. Admiralty jurisdiction for torts depends on both the locality of the wrong and whether it bears a significant relationship to traditional maritime activity. *See, e.g., Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Admiralty jurisdiction for contracts exists only if the contract is maritime in nature, that is, if the contract "ha[s] reference to maritime services or maritime transactions." *North Pacific Steamship Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, (1919).

"The boundaries of admiralty jurisdiction over contracts . . . being conceptual rather than spatial, have always been difficult to draw." *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961). Nevertheless, *Thames* notes that there is a boundary point between a contract for the construction of a vessel, which is not maritime, and a contract for the repair of a vessel, which is maritime. Therefore, from a contract perspective the characterization of what is being provided to a vessel becomes important.

Congress and the courts additionally expanded admiralty jurisdiction for certain traditional admiralty-related activities. For example, Broward Yachts' claim arises under the Federal Maritime Lien Act, which states that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel" that may be enforced by a civil action in rem. 46 U.S.C. § 31342. The term "necessaries" is defined as including "repairs, supplies, towage, and the use

of a dry dock or marine railway." 46 U.S.C. § 31301(4). There is no definition of "vessel" under the Maritime Lien Act. Therefore, the broad definition of vessel under 1 U.S.C. § 3 applies.

In the maritime lien context, courts look to the nature of what a third-party provides to a vessel. Storing and maintaining a vessel is substantially related to a "traditional maritime activity." *Sisson v. Ruby*, 497 U.S. 358, 367 (1990). Consequently, providing storage or wharfage constitutes "a necessary" to the vessel and is the proper subject of a maritime lien. *See, e.g., The Western Wave v. Bd. of Comm. of Port of New Orleans*, 77 F.2d 695 (5th Cir. 1935); *The Denelfred*, 59 F.2d 213 (E.D. Mich. 1932). Here, it is undisputed that Broward Yachts provided wharfage and storage. Unlike the claimants in *Thames*, Broward Yachts' rights do not flow from a construction contract for the yacht. Therefore, the Eleventh Circuit's reliance on *Thames* is misplaced. Accordingly, the Courts below erred in determining that there was no jurisdiction over Broward Yacht's maritime lien.

The fallacy of conditioning this case on the exception to admiralty jurisdiction for construction contracts is easily exposed. If the relationship between Seagrove and Broward Yachts truly related to the construction of the yacht, then Seagrove should be able to sue Broward Yachts for failing to complete construction on the yacht. Seagrove cannot bring such a lawsuit because the nature of the relationship between Seagrove and Broward Yachts is unrelated to the construction of the yacht. Furthermore, taking the Eleventh Circuit's reasoning to its logical conclusion, assume that a 600-foot-long vessel sails across the ocean to a port where a crane that is necessary to complete its intended purpose will be installed. Under the Eleventh Circuit's analysis, this craneless ship, sailing across navigable waters, is not a "vessel" for purposes of admiralty jurisdiction, and there would not be admiralty jurisdiction for any wharfage charges it may incur on its voyage. Further, the yacht in this case traveled on navigable waters. If someone were injured on the yacht as it traversed navigable waters, there is no question that there would be admiralty jurisdiction. The towing company also would have an admiralty claim if it were unpaid for its service. Accordingly, there is no logical reason why Broward Yachts – a third party no different from a towing company – should not also have a claim in

admiralty for storing a yacht that was capable of being used – and in fact already had been used – as a means of transportation on the water.

The Eleventh Circuit's decision clearly misstates the law for determining whether a lien claimant comes within admiralty jurisdiction. Federal courts look to the substance of a lien claimant's rights to determine if admiralty jurisdiction exists. The Courts below erred in finding that this case should fall within an exception to admiralty jurisdiction for vessel construction contracts. Like in *McCarthy* and *Burks*, the yacht in this case falls well within the well-established definition of "vessel" under the law. Certiorari should be granted to resolve the conflict between the Eleventh Circuit's decision and the decisions by the Second and Fifth Circuits interpreting 1 U.S.C. § 3.

CONCLUSION

For the reasons discussed above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on behalf of Broward Yachts this 12 day of October 2004.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13669

D.C. Docket No. 03-60304-CV-PAS

BROWARD YACHTS, INC.,
a Florida corporation,

Plaintiff-Appellant,

versus

VESSEL KNOWN AS DESTINY HULL
NO. 104, its engines, tackle, furniture,
apparel, gear, equipment, and all other things
thereunto appertaining and belonging, in rem,

Defendant,

SEAGROVE TRADING, INC.,
a Delaware company,

Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 3, 2004)

Before WILSON, FAY and MESKILL*, Circuit Judges.

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*Honorable Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

PER CURIAM:

Broward Yachts, Inc., ("Broward Yachts") is the owner of a mega-yacht manufacturing business in Dania Beach, Florida, which provided wharfage and storage to a vessel known as Destiny Hull No. 104 ("Destiny Hull"). Broward Yachts commenced an *in rem* admiralty and maritime action seeking to recover unpaid wharfage and storage costs from Seagrove Trading, Inc., ("Seagrove"), the owner of the Destiny Hull. The district court dismissed the action for lack of admiralty jurisdiction, and this appeal followed. For the reasons stated below, we affirm.

Background

In July, 2000, Destiny Yachts, L.C., a builder of luxury yachts, entered into an agreement with Allied Caribbean, Inc. to construct the Destiny Hull. As construction proceeded, Destiny Yachts encountered financial difficulties that resulted in numerous construction delays. Ultimately, Allied Caribbean sold the Destiny Hull to Seagrove, which was still under construction at the Lauderdale Marine Center in Broward County, Florida.

On October 16, 2002, Destiny Yachts moved its manufacturing operations from the Lauderdale Marine Center to Broward Yachts's premises pursuant to a license agreement entered into between Destiny Yachts and Broward Yachts.

Seagrove was not a party to the agreement. The Destiny Hull was transported from the Lauderdale facility to Broward Yachts's facility by floating the hull approximately six miles with the assistance of a tug boat. At no time during this transport of the Destiny Hull did the Destiny Hull operate under its own power.

The district court found that as of January 2003, the Destiny Hull was between sixty and seventy percent completed for its intended purpose of being a luxury yacht.[1] Several months after the

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[1] Specifically, the district court found:

As of January 2003, the Destiny Hull was between sixty and seventy percent (60-70%) completed for its intended purpose of being a luxury yacht. Among other things, there was no steering wheel in the wheelhouse and the electronics, including batteries and

Destiny Hull was removed from the water and placed in Broward Yachts's facility, Destiny Yachts defaulted on its payments to Broward Yachts. Broward Yachts subsequently sued Destiny Yachts in state court, and Destiny Yachts was eventually evicted from Broward Yachts's facility. The partially-completed Destiny Hull remained on Broward Yachts's premises. Broward Yachts filed this *in rem* admiralty and maritime action against the Destiny Hull in March, 2003, seeking unpaid dockage, storage, and haul-out fees.

Seagrove moved to dismiss Broward Yachts's complaint on the grounds that Broward Yachts could not claim a maritime lien against a partially-completed hull and could not invoke federal *in rem* admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333.[2] Broward Yachts argued, as it does on appeal, that the Destiny Hull was sufficiently complete to constitute a vessel, or, in the alternative, that it had a contract with Destiny Yachts, on behalf of Seagrove, to provide "necessaries" to the vessel, which are the proper subject of a maritime lien.

Discussion

We review a district court's decision to dismiss for lack of admiralty jurisdiction *de novo*. *See Wilkins v. Commercial Inv. Trust Corp.*, 153 F.3d 1273, 1276 (11th Cir. 1998)(per curiam). We review *de novo* the determination of whether a hull qualified as a

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shore-power systems had not yet been installed. Additionally, numerous wires were hanging down, and the vessel's lighting, appliances, and fixtures were not installed. Furthermore, the engines were not functional, as they were not mounted in place, connected to fuel, connected to a power source, connected to a steering system, or connected to an exhaust system.
Broward Yachts, Inc. v. The Vessel known as Destiny Hull No. 104, NO. 03-60304-CV-PAS, at 3 (S.D. Fla. June 24, 2003)(granting Seagrove's Motion to Dismiss).

[2] 28 U.S.C. § 1333 provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction. . . ." 28 U.S.C. § 1333(1).

"vessel" for purposes of admiralty jurisdiction. *See Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.2d 919, 922 (11th Cir. 2001).

Critical to the determination that admiralty or maritime jurisdiction exists under § 1333 is whether the Destiny Hull qualified as a vessel. *See Wilkins*, 153 F.3d at 1276. For admiralty jurisdiction to apply to a claim for a maritime lien, the claim must pertain to a vessel. 1 U.S.C. § 3 (defining "vessel" as a watercraft "used, or capable of being used, as a means of transportation on water"). In *Thames Towboat Co. v. The Schooner "Francis McDonald*, 254 U.S. 242 (1920), the Supreme Court held that a plaintiff's contract to furnish materials, work and labor for a schooner's completion, made after the schooner was launched but while not yet sufficiently advanced to discharge the intended functions, was not within admiralty and maritime jurisdiction. *See id.* at 243. Similarly, we have held that "[u]ntil a vessel is completed and launched it does not become a ship in the legal sense, and therefdmeyerore admiralty jurisdiction does not exist." *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 850 (11th Cir. 1988).

In this case, after conducting multiple evidentiary hearings and hearing the testimony of expert witnesses, the district court found that the Destiny Hull was only sixty to seventy percent complete. These findings of fact, uncontested on appeal, indicate that the Destiny Hull was not yet "sufficiently advanced to discharge the functions for which she was intended," and therefore, was not a vessel for the purposes of invoking admiralty or maritime jurisdiction.[3]

Broward Yachts next argues that its contract to provide "necessaries" for the Destiny Hull, namely storage, invokes admiralty and maritime jurisdiction. Although a contract to store a

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[3] We are unpersuaded by Broward Yachts's argument that towing the Destiny Hull through navigable waters transforms a partially-completed hull into a "vessel" because it has been "used" as a "means of transportation by water." The undisputed evidence clearly indicated that the vessel was not completed, and Broward Yachts ha cited, nor can we find, any case which stands for the proposition that a partially-complete hull is transformed into a vessel during a short move on navigable waters.

vessel falls within federal admiralty and maritime jurisdiction, *see Sisson v. Ruby*, 497 U.S. 358, 367 (1990), the Destiny Hull was not a "vessel" for the purpose of invoking admiralty and maritime jurisdiction. Thus, Broward Yachts's contract with Destiny Yachts to provide storage facilities for the partially-completed Destiny Hull does not invoke admiralty and maritime jurisdiction.

AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 3, 2004
THOMAS K. KAHN
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 03-60304-CIV-SEITZ/BANDSTRA

BROWARD YACHTS, INC.,
a Florida corporation,

Plaintiff,

vs.

THE VESSEL, known as DESTINY HULL NO. 104, its engines, tackle, furniture, apparel, gear, equipment, and all other things thereunto appertaining and belonging, *in rem*,

Defendant,

SEAGROVE TRADING, INC.,
a Delaware company,

Claimant/Owner.
_____/

ORDER GRANTING SEAGROVE TRADING, INC.'S MOTION TO DISMISS AND MOTION FOR ATTORNEYS FEES AND COSTS

THIS MATTER is before the Court on Claimant/Owner Seagrove Trading, Inc.'s ("Seagrove") Motion to Dismiss and Motion for Attorneys Fees and Costs [DE-22]. Plaintiff Broward Yachts, Inc. (Broward Yachts"), the owner of a mega-yacht manufacturing facility in Dania Beach, Broward County, Florida, filed this *in rem* admiralty and maritime action against Defendant Vessel known as Destiny Hull No. 104 (Destiny Hull") to recover $140,400.00 in unpaid dockage, storage and haul-out fees. Seagrove Trading, Inc. ("Seagrove"), as claimant and owner of the Destiny Hull, has moved to dismiss this action for lack of subject matter jurisdiction, and seeks to recover attorneys fees and costs.

Specifically, Seagrove argues that because the 105-foot Destiny Hull is still under construction, a maritime lien cannot attach to the uncompleted hull, and therefore the Court lacks *in rem* admiralty and maritime jurisdiction over this matter. Additionally, Seagrove contends that it is entitled to recover attorneys fees and costs expended in this action, as Broward Yachts lacked a sufficient legal basis to seek the arrest of the hull *in rem*, and no exigent circumstances existed requiring the hull's immediate *ex parte seizure*. Having considered Seagrove's motion, Broward Yachts' response in opposition, Seagrove's reply thereto, and having a two-day evidentiary hearing and presided over six emergency status conferences relating to the release of the hull from Broward Yachts' premises, the Court will grant Seagrove's motion to dismiss and motion for attorneys fees and costs for the reasons stated herein.

FACTUAL AND PROCEDURAL BACKGROUND

To understand what precipitated this wave of litigation, a brief history of the events leading to this dispute is warranted.[1] On July 3, 2000, Destiny Yachts, L.C. ("Destiny"), a builder of luxury yachts, entered into a Yacht Construction Agreement with Allied Caribbean, Inc. ("Allied") to construct the 105-foot Destiny Hull for the base price of $6,930,000.00. (Mot. to Dismiss, Exh. 1 at 8). As part of the Yacht Construction Agreement, Destiny promised to "provide all equipment, machinery, electronics, components, furnishings, china, crystal, dining and serving utensils, linens and other items reasonably required to construct and fully outfit a luxury motor yacht..." (Id., Exh. 1 at 3).

[1] On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court may consider matters outside of the pleadings, such as testimony and affidavits, in order to resolve relevant factual disputes relating to the Court's jurisdiction. See Goodman v. Sipos, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001); Hatteras of Lauderdale, Inc. v. Gemini Lady, 662 F. Supp. 1525-27 (S.D. Fla. 1987). Because the Court must make a factual determination of whether the Destiny Hull is a completed vessel for purposes of invoking the Court's admiralty jurisdiction, the Court conducted a two-day evidentiary hearing on this matter on March 26-27, 2003.

As construction on the hull proceeded, Destiny encountered financial troubles that resulted in numerous construction delays. Ultimately, on August 22, 2002, Destiny and Allied signed Amendment No. 1 to the Yacht Construction Agreement, noting that "construction of the Vessel is still not complete," and indicating Allied's intent to assign Seagrove all of its rights, powers, privileges, and benefits under the Yacht Construction Agreement with Destiny. (Id., Exh. 3 at 1-2). Thereafter, on September 9, 2002, Destiny executed a Bill of Sale, formally transferring title of the Destiny Hull to Seagrove. (Id., Exh. 4).

In approximately mid-October, 2002, Destiny, which was still in financial straits, moved its manufacturing operations from its former location at the Lauderdale Marine Center to Broward Yachts' premises pursuant to a license agreement entered into between Destiny and Broward Yachts. (Id., Exh. 5). While recognizing that Destiny "has and is experiencing cash flow problems that have impacted its ability to continue operations as in the past, "Broward Yachts agreed to permit Destiny to continue manufacturing the Destiny Hull on Broward Yachts' premises for the monthly sum of twenty-nine thousand one hundred and ninety-six dollars ($29,196.00). (Id.) Seagrove, the title owner of the Destiny Hull, was not a party to this license agreement between Destiny and Broward Yachts.

In order to transport the Destiny Hull, which was still under construction, from the Lauderdale Marine Center to Broward Yachts' facility, Destiny floated the hull approximately six miles down the New River, around the Dania Cut, down the Intracoastal Waterway, and into Broward Yachts' East Yard with the assistance of a tug boat. (Tr., March 26-27, 2003). At no time during its transport of the hull from the Lauderdale Marine Center of Broward Yachts' East Yard did the Destiny Hull operate under its own power. (Id.). Once the hull arrived at Broward Yachts' premises, Mega Marine Yacht Service, Inc. ("Mega Marine"), hauled the Destiny Hull out of the water utilizing Mega Marine's Travelift.[2]

[2]Marc Slakoff, a marine surveyor who inspected the Destiny Hull, described the Travelift's operations as follows:

> The way it works is, this machinery was driven out where it is actually straddling a slip in the waterway and these straps

As of January 2003, the Destiny Hull was between sixty and seventy percent (60-70%) completed for its intended purpose of being a luxury yacht.[3] (Id.). Among other things, there was no steering wheel in the wheelhouse and the electronics, including batteries and shore-power systems had not yet been installed. (Id.) Additionally, numerous wires were hanging down, and the vessel's lighting, appliances, and fixtures were not installed. (Id.). Furthermore, the engines were not functional, as they were not mounted in place, connected to fuel, connected to a power source, connected to a steering system, or connected to an exhaust system. (Id.).

Several months after the Destiny Hull was removed from the water and placed in Broward Yachts' facility, Destiny apparently defaulted on its payments to Broward Yachts under the license agreement. As a result, on February 4, 2003, Broward Yachts sued Destiny in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, alleging breach of the license agreement and fraud in the inducement, and seeking to evict Destiny from Broward Yachts' premises. (Mot. to Dismiss, Exh. 6). On February 5, 2003, the state court entered a writ of possession on behalf of Broward Yachts, evicting Destiny from the premises. (Id.,

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> are lowered down under water and the boat is driven or pulled up above the straps. Then the straps are raised up by use of the hydraulic mechanism on the Travelift, and then it raises the boat out of the water. Once the boat is out of the water the Travelift has its own engine in it, literally drives the boat to where it wants to set the boat down on a cradle or on chocks or some other way of supporting the boat. Then the straps are opened up where they split in two, and that frees the Travelift from the boat once it is supported, and then you can drive the Travelift away.

(Tr., March 26, 2003).

[3] The Court made this factual finding at the conclusion of hearing all of the evidence presented at the two-day evidentiary hearing on March 26-27, 2003.

Exh. 7). The uncompleted Destiny Hull remained on Broward yachts' premises.[4]

Having yet to receive payment from Destiny for the use of Broward Yachts' facilities under the license agreement, Broward Yachts filed this *in rem* admiralty and maritime action against the Destiny Hull on March 5, 2003, to recover $140,400.00 in unpaid dockage, storage and haul-out fees. Invoking the Court's *in rem* admiralty and maritime jurisdiction under 28 U.S.C. § 1333, Broward Yachts moved *ex parte* for the immediate arrest and seizure of the Destiny Hull based on exigent circumstances, namely that Broward Yachts had "been informed that the owners of the vessel intend(ed) on taking the vessel out of the jurisdiction of this Court in the immediate future." (Pl.'s Mot. For Issuance of Arrest Warrant ¶3). The Court granted Broward Yachts' motion, issued a warrant for arrest of the Destiny Hull, and appointed Mega Marine as substitute custodian. At approximately 5:20 on March 10, 2003, the U.S. Marshal arrested the Destiny Hull.

Shortly after the arrest of the Destiny Hull, Seagrove agreed to pay $157,248.00 into the Court's registry, representing the amount of Broward Yachts' claim plus six percent interest, and the parties filed a joint motion for release of the vessel. On March 19, 2003, pursuant to the parties' agreed motion and Seagrove's payment of monies into the Court's registry, the Court ordered the immediate release of the Destiny Hull. After nearly one month of litigation, including a two-day post-seizure evidentiary hearing on March 26-27, 2003 and six subsequent status conferences over the logistics and impediments to removing the 105-foot Hull from Broward Yachts' property, the hull was finally removed on April 18, 2003.

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[4]In an effort to recover its property, Seagrove advised Broward Yachts in writing that it was the lawful owner of the Destiny Hull and wished to obtain possession of its vessel. (Id., Exh. 8). Seagrove contends that Broward Yachts refused to relinquish possession of the vessel and notified Seagrove that it was entitled to a landlord's lien over the vessel. Although Broward Yachts' entitlement to a lien is not an issue before the Court in this action, Seagrove argues that Broward is not entitled to a landlord's lien because Seagrove, as owner of the Destiny Hull, was not a party to the license agreement between Destiny and Broward Yachts.

JURISDICTION

Seagrove has moved to dismiss Broward Yachts' Complaint *In Rem* on grounds that Broward Yachts cannot claim a maritime liem against an uncomplete hull, and therefore, cannot properly invoke the Court's *in rem* admirably and maritime jurisdiction pursuant to 28 U.S.C. § 1333. In response, Broward Yachts argues that the Destiny Hull was sufficiently completed to constitute a vessel for purpose of invoking the Court's *in rem* admirably and maritime jurisdiction. Alternatively, Broward Yachts contends that it did not contract with Seagrove to construct the Destiny Hull, but rather contracted with Destiny, on behalf of Seagrove, to provide "necessaries" to the vessel, and such "necessaries" including storage and wharfage are the proper subject maritime lien.

It is well-settled principle in admiralty law that "[u]ntil a vessel is completed and launched it does not become a ship in legal sense, and therefore admiralty jurisdiction does not exist. " Hatteras of Luaderdale, Inc. v. Gemini Lady, 853 F.2d 848, 850 (1th Cir. 1988) (citing North Pacific Steamship Co. v. Hall Bros. Mrine Railway & Shipbuilding Co., 249 U.S. 119, 127 (1919)). Although admiralty jurisdiction does arise when a completed vessel undergoes repairs, a vessel that is not yet in a condition to function as initially intended is not a completed vessel for purpose of admiralty jurisdiction. Hatteras, 853 F.2d at 851 (holding that a vessel which has not been customized with running lights and custom glass enclosures according to specifications is not in a condition to function as intended and is not a complete vessel); see also Thames Towboat Co. v. The Francis McDonald, 254 U.S. 242, 243 (1920) (finding no admiralty jurisdiction where, although the vessel was towed to another shipyard for completion, "the schooner was manifestly incomplete her masts were not in, the bolts and beams and gaff were lying on deck, the forward house was not built, and she was not in condition to carry on any service"); Garcia v. American Marine Corp., 432 F.2d 6, 7 n.3 (5th Cir.1970)[5] (upholding

[5]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit rendered on or before September 30, 1981.

trial court's determination that vessel under construction was not a completed vessel where it was not capable of self-locomotion, could not sail, had unconnected engines, and incomplete piping, electric cables and writing).[6]

At the conclusion of the evidentiary hearing, the Court found that the Destiny Hull was no more than sixty to seventy percent completed. (Tr., March 27, 2003). Specifically, the Court noted that even Broward Yachts' own expert, Robert Dean, testified that the Destiny Hull did not even have a steering wheel n the wheelhouse. (Id.). Additionally, the evidence revealed that numerous wires were hanging down, the vessel's lighting, appliances, and fixtures were not installed, and the engines were not functional, as they were not mounted in place, connected to fuel, connected to a power source, connected to a steering system, or connected to an exhaust system. (Id.) Thus, because the Destiny Hull was not yet in condition to function as a luxury yacht as initially intended, it was not a

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[6] Notwithstanding the well-settled law in this Circuit, Broward Yachts contends that "even though incomplete," the Destiny Hull is a vessel because it traveled through navigable waters to reach Broward Yachts' premises. See Resp. To Mot. To Dismiss at 13. However, none of the cases from this Circuit upon which Broward Yachts relies are even remotely applicable to the facts in this case. See, e.g., Mink v. Genmar Industries, Inc., 29 F.3d 1543 (11th Cir. 1994) (holding that a personal injury claim against manufacturer of 38-foot pleasure craft upon which plaintiff was injured while boat was traveling at a high rate of speed falls within the court's admiralty jurisdiction); Sea Vessel, Inc. v. Reyes, 23 F.3d 345 (11th Cir. 1994) (holding that a vessel owner's claim for limitation of liability as owner of vessel that caught fire while dry-docked for routine repairs and maintenance falls within the court's admiralty jurisdiction); Nehring v. Steamship M/V Point Vail, 901 F.2d 1044 (11th Cir. 1990) (holding that intervening claims by trust funds for contributions owed by defendant on behalf of seamen fall within the court's admiralty jurisdiction); J.K. Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, Hull No. 1, 625 F.2d 44 (5th Cir. 1980)(holding that court had admiralty jurisdiction over claims by yacht purchaser against yacht manufacturer's secured party which failed to transfer possession of yacht to purchaser).

completed vessel for purpose of admiralty jurisdiction. Hatteras, 853, F.2d at 851.

Alternatively, Broward Yachts argues that because it contracted with Seagrove to provide "necessaries" for the Destiny Hull, namely storage, the Court has admiralty and maritime jurisdiction over this matter. Although it is well settled that a contract to store a vessel falls within the Court's admiralty and maritime jurisdiction, regardless of whether the vessel is removed for navigable waters and dry-docked, none of the cases upon which Broward Yachts relies involves the storage of an uncompleted vessel that is still under construction. See Sisson v. Ruby, 497 U.S. 358 (1990)(holding the limitation of liability claim brought by owner of pleasure yachts destroyed by fire while docked at marina falls within court's admiralty and maritime jursidiction); Goodman v. 1973 26 Foot Trojan Vessel, 859 F.2d 71 (8th Cir. 1988) (holding that marina owner's *in personam* claim against vessel owner for sum due for furnishing dockage and electrical meter to 26-foot boat falls within court's admiralty and maritime jurisdiction); American E. Dev. Corp. v. Everglades Marina, Inc. 608 F.2d 123 (5th Cir. 1979) (holding that claims for damages against marina owner and marina's insurer brought by owners of 24-foot and 18-foot yachts, which were fully operational and regularly moved in and out of the water and were destroyed by fire set by marina president while dry-docked at marina, fall within the court's admiralty and maritime jurisdiction); Commercial Union Ins., Co. v. Used Boat Haven,Case No. 94 CIV 0448(JFK), 1961 WL 191960 (S.D.N.Y. Apr. 22, 1996)(holding that claims for breach of contract and bailment obligations involving destruction by fire of used boat stored at boatyard falls within the court;s admiralty and maritime jurisdiction); Omaha Indemnity Co. v. Whaleneck Harbor Marina, Inc.610 F. Supp. 154 (E.D.N.Y. 1985) (holding that claim for damages to boat which fell from cradle while stored at boatyard falls within the court's admiralty and maritime jurisdiction); Schuster v. Baltimore Boat Sales, Inc. 471 F. Supp. 321 (D. Md. 1979)(holding that breach of contract claim for failure to prepare sailboat for winter storage falls within the court's admiralty and maritime jurisdiction). Because Broward Yachts has cited no authority for the proposition that a claim to recover unpaid storage fees for a hull under construction falls within the Court's *in rem* admiralty and maritime jurisdiction, and because the Court has found that the Destiny Hull was not a completed vessel for purpose of

invoking the Court's admiralty jurisdiction, the Court must dismiss this action for lack of jurisdiction.[7]

ATTORNEYS FEES AND COSTS

As for Seagrove's motion for attorneys fees and costs, Local Admiralty and Maritime Rule C(7) provides that "if the seizure was predicated upon a showing of 'exigent circumstances' under Local Admiralty Rule C[(2)](b), and the Court finds that such exigent circumstances did not exist, the Court *shall* award attorneys' fees, costs, and other expenses incurred by any party as a result of the seizure. "S.D. Fla. L. Admr. & Mar. R. C(7) (emphasis added). Here, Broward Yachts filed a Rule C(2)(b) Motion for Issuance of Arrest Warrant Based Upon Exigent Circumstances, notifying the Court "that the owners of the vessel intended on taking the vessel out of the jurisdiction of this Court in the immediate future." See [DE-3]. Broward Yachts further represented to the Court that "[b]ased upon the above exigent circumstances, issuance of the arrest warrant for the vessel is appropriate and review by this Court pre-arrest is impracticable." Id.

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[7]Although neither parties nor the Court have discovered any case directly addressing the question of whether a bill of sale has the legal effect of transforming an uncompleted vessel into a completed vessel for purpose of invoking the Court's *in rem* admiralty jurisdiction, the Builder Certification and First Transfer of Title, executed on the same day as September 9, 2002 Bill of Sale, clearly indicates that the phase of construction covered by the certificate was the "hull only," and not "entire construction." See Seagrove's Reply at 5 Exh.1; see also Rogers v. M/V Ralph Bollinger, 279 F. Supp 92, 95-96 n.24 (E.D. La 1968)(holding that an uncompleted vessel did not fall within the court's admiralty jurisdiction for purpose of a warranty of seaworthiness claim, and noting that "[i]t doesn't alter matters that the vessel has been documented, for the documentation of a vessel merely establishes its identity...and does not define the reach of the warranty of seaworthiness"). Thus the Bill of Sale, read in Destiny Hull was not completed vessel and therefore the vessel does not fall within the Court's *in rem* admiralty and maritime jurisdiction.

As the record in this case reveals, however, "exigent circumstances" never existed which required the immediate seizure of the Destiny Hull. In fact, not only is it apparent that Seagrove was never in a position to immediately remove the 105-foot hull from Broward Yachts' premises, but as Seagrove accurately recounts, "it ultimately required a period of over 3 weeks time, 6 hearings, 7 court orders, 2 aborted attempts, and 4 armed U.S. Marshals for Seagrove to successfully remove [the Destiny Hull] and its equipment from Broward [Yachts'] facility. See Reply at 7. Thus, because the Court finds that exigent circumstances never existed, the Court must award attorneys' fees, costs and other expenses incurred by Seagrove as a result of the seizure. See S.D. Fla. L. Admr. & Mar. R. C(7). However, because the Court does not have a complete record before it of Seagrove's fees and costs in this matter, the Court will grant Seagrove leave to supplement the record with a detailed and sufficiently documented account of the attorneys fees, costs, and other expenses incurred by Seagrove as a result of the vessel seizure.

CONCLUSION

Based upon the foregoing reasons, it is hereby

ORDERED that:

(1) Seagrove's Motion to Dismiss and Motion for Attorneys Fees and Costs [DE-22] is GRANTED;

(2) Broward Yachts' Complaint *In Rem* is DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction;

(3) Seagrove shall have **thirty (30)** days from the date of this Order to file an Amended Motion for Attorneys Fees and Costs, setting forth a detailed and sufficiently documented account of the attorneys fees, costs, and other expenses incurred as a result of the vessel seizure;

(4) All pending motions not otherwise ruled upon are denied as moot;

(5) This case is CLOSED; and

(6) The Court will retain jurisdiction over this matter for the purposes of addressing Seagrove's request for attorneys fees and costs, and for addressing the outstanding issue of whether the Court should proceed with a criminal or civil contempt proceeding against Glenn F. Straub, President of Broward Yachts.

DONE and ORDERED in Miami, Florida this 23rd day of June, 2003.

s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

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FILED by s/___ D.C.
JUN 24 2003
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. MIAMI

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13669-BB

BROWARD YACHTS, INC.,
a Florida corporation,

Plaintiff-Appellant,

versus

VESSEL KNOWN AS DESTINY HULL
NO. 104, its engines, tackle,
furniture, apparel, gear,
equipment, and all other things
thereunto appertaining and belonging, in rem,

Defendant,

SEAGROVE TRADING, INC.,
a Delaware company

Claimant-Appellee.

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On Appeal from the United States District Court for the
Southern District of Florida

- - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19 __, _____F.2d_____).

Before:WILSON, FAY and MESKILL*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED BY THE COURT:

s/ Charles R. Wilson
UNITES STATES CIRCUIT JUDGE

ORD-4
(12/01)

*Honorable Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 13 2004
THOMAS K. KAHN
CLERK

UNITED STATES CODE
TITLE 1. GENERAL PROVISIONS
CHAPTER 1--RULES OF CONSTRUCTION

§ 3. "Vessel" as including all means of water transportation.

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Current through P.L. 108-323 (excluding P.L.108-310, 108-311) approved 10-06-04

UNITED STATES CODE
TITLE 46. SHIPPING [PARTIAL REVISION]
CHAPTER 313. COMMERCIAL INSTRUMENTS AND MARITIME LIENS

SUBCHAPTER I - GENERAL

§ 31301. Definitions

In this chapter--

(1) "acknowledge" means making--

(A) an acknowledgment or notarization before a notary public or other official authorized by a law of the United States or a State to take acknowledgments of deeds; or

(B) a certificate issued under the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961;

(2) "district court" means--

(E) the High Court of American Samoa; and

(F) any other court of original jurisdiction of a territory or possession of the United States;

(3) "mortgagee" means--

(A) a person to whom property is mortgaged; or

(B) when a mortgage on a vessel involves a trust, the trustee that is designated in the trust agreement;

(4) "necessaries" includes repairs, supplies, towage, and the use of a dry dock or marine railway;

(5) "preferred maritime lien" means a maritime lien on a vessel--

(A) arising before a preferred mortgage was filed under section 31321 of this title;

(B) for damage arising out of maritime tort;

(C) for wages of a stevedore when employed directly by a person listed in section 31341 of this title;

(D) for wages of the crew of the vessel;

(E) for general average; or

(F) for salvage, including contract salvage; and

(6) "preferred mortgage"--

(A) means a mortgage that is a preferred mortgage under section 31322 of this title; and

(B) also means in sections 31325 and 31326 of this title, a mortgage, hypothecation, or similar charge that is established as a security on a foreign vessel if the mortgage, hypothecation, or similar charge was executed under the laws of the foreign country under whose laws the ownership of the vessel is documented and has been registered under those laws in a public register at the port of registry of the vessel or at a central office.

Effective: [See Text Amendments]

§ 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner--

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

Effective: January 01, 2003

(2)

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

No. 04-489

IN THE

Supreme Court of the United States

BROWARD YACHTS, INC., a Florida Corporation,

Petitioner,

v.

SEAGROVE TRADING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a partially completed yacht is a "vessel" for the purposes of invoking admiralty and maritime jurisdiction.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent, Seagrove Trading, Inc., hereby certifies that it has no parent corporation and that no publicly held company owns ten percent or more of its stock.

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Rules

Sup. Ct. R. 10 1

STATEMENT OF THE CASE

To the extent it is not argumentative, respondent agrees with the statement of the case set forth in the petition. In addition, respondent refers the Court to the findings of fact — undisputed by petitioner — in the order of the district court appended to the petition. (Pet'r's App. at A7-10.)

REASONS FOR DENYING THE PETITION

The petition seeks review of an unpublished opinion of the United States Court of Appeals for the Eleventh Circuit on the ostensible basis that it conflicts with the decisions of two other circuits. However, given that the decision below is unpublished, it plainly will have no prospective impact on future litigants. This fact in and of itself illustrates the petition's total lack of "compelling reasons" for granting certiorari. *See* Sup. Ct. R. 10. Additionally, inasmuch as the gravamen of the petition is a mere disagreement with the Eleventh Circuit's application of a longstanding rule of law established by the Court, there exists no reason, compelling or otherwise, for the Court to exercise its discretion to grant the petition. *See id.* ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

I. There Is No Conflict Between the Decision Below and the Decisions of This Court or Other Circuit Courts of Appeals

Almost 150 years ago, in *The People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857), this Court held that contracts relating to the original construction of a ship are not maritime contracts that come within the admiralty

jurisdiction of federal courts. *Id.* at 401-02. The Court has followed this rule ever since. *E.g.*, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 n.7 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, (1961); *New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 99 (1922); *The Winnebago*, 205 U.S. 354, 363 (1907); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 553 (1874); *Roach v. Chapman*, 63 U.S. (22 How.) 129, 132 (1859).

Additionally, more than eighty years ago, in two decisions issued a year apart, this Court crafted the standard for determining when a vessel being constructed pursuant to contract comes into legal existence: "The structure does not become a ship, in the legal sense, until it is completed and launched." *North Pacific S.S. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 127 (1919). A year later, in *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242 (1920), the Court clarified the meaning of "completed" when it held that a contract to construct a vessel "not sufficiently advanced to discharge the functions for which intended" nor in a "condition to function as intended" is not maritime in nature. *Id.* at 243, 245.

Federal courts have rigorously applied this benchmark ever since. Far from either creating a "clear split" among the circuits or misapplying the rule, as the petition suggests, the Eleventh Circuit decided the issue before it with a straightforward application of the principles set forth by this Court over eighty years ago. Further, under *Beers* and its progeny, it is abundantly clear that the lease agreement pursuant to which the petitioner supplied its facility for construction of the Destiny Hull is not a maritime contract.

A. Both Cases Cited by the Petition as Conflicting with the Instant Case Are Inapplicable Given the Facts Found Below

The petition asserts that the Eleventh Circuit's decision below conflicts with *McCarthy v. the Bark Peking*, 716 F.2d 130 (2d Cir. 1983), and *Burks v. American River Transportation Co.*, 679 F.2d 69 (5th Cir. 1982), two cases that construed the definition in 1 U.S.C. § 3 of what constitutes a "vessel." However, both of these cases not only can be readily distinguished from the case at bar, but also are in fact inapposite.

The plaintiff in *McCarthy* sought damages against a museum vessel under the Longshoreman's and Harborworker's Compensation Act ("LHCA"), 33 U.S.C. §§ 901-950, for injuries he suffered while painting the upper mainmast. Because the LHCA provided a remedy for those injured as a result of the "negligence of a vessel," 33 U.S.C. § 905(b), the Second Circuit panel sought to determine whether the museum piece fit the definition of "vessel" set forth in 1 U.S.C. § 3. *McCarthy*, 716 F.2d at 133. The vessel had been launched more than sixty years before, although it had not put out to sea under its own power in forty years. *Id.* at 135 n.6. The panel nevertheless found that "as long as [the museum vessel] rides at anchor in the harbor, ready and able to head for the open seas, even in tow, she remains a vessel" for the purposes of 1 U.S.C. § 3. *Id.* at 136.

Similarly, in *Burks*, the plaintiff longshoreman brought an action for unseaworthiness against a barge owner for injuries he had suffered on the barge while offloading cargo to a second non-propelled barge on which he principally worked. 679 F.2d at 70. The plaintiff sought to come within

an exception in the LHCA that excluded any "member of a crew of any vessel" from LHCA benefits, and thus effectively permitted an action for unseaworthiness otherwise unavailable to longshoremen. *Id.* at 75 (quoting 33 U.S.C. § 902(3)). Observing that in *Norton v. Warner Co.*, 321 U.S. 565 (1944), this Court had found that a dumb barge fell within the definition of "vessel" in 1 U.S.C. § 3, the Fifth Circuit court concluded that the two barges at issue also fell within the definition. *Burks*, 679 F.2d at 75.

There are several overarching and interrelated distinctions between the instant case and *McCarthy* and *Burks*. First, both *McCarthy* and *Burks* were LHCA-related actions that sounded in tort. The case at bar is a 46 U.S.C. § 31342 *in rem* action, in which the petitioner asserts that it has a maritime lien against the Destiny Hull pursuant to an agreement with Destiny to lease its premises for construction of the hull. Because *McCarthy* and *Burk* are tort actions and the plaintiffs therein did not, as petitioner does here, seek to invoke admiralty jurisdiction based in contract, these Second and Fifth Circuit cases are entirely inapplicable.

Second, while the Destiny Hull was found to be only partially completed, (Pet'r's App. at A7), both *McCarthy* and *Burks* involved "completed" vessels. There was no question that the *McCarthy* vessel had "become a ship, in the legal sense" because it had long since been "completed and launched." *North Pacific S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 127 (1919). So, too, had the barges in *Burks* been completed long before the question of whether they fell within the definition of "vessel" in 1 U.S.C. § 3 arose.

Third, and most important, *McCarthy* and *Burks* did not involve a contract to construct a vessel. Based upon this Court's decisions in *North Pacific Steamship* and *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242 (1920), federal courts have consistently and uniformly held that a vessel under construction pursuant to contract is not a "vessel" for the purposes of invoking admiralty and maritime jurisdiction until the structure is "sufficiently advanced to discharge the functions for which she was intended" and/or in a "condition to function as intended."[1]

It is undisputed that the Destiny Hull was a vessel under construction pursuant to contract and that its structure was only two-thirds advanced to discharge her intended function as a luxury yacht. (Pet'r's App. at A9.) It has long since been settled that there is no basis for invoking admiralty and maritime jurisdiction under such circumstances. The circumstances in *McCarthy* and *Burks* were not even remotely similar to the instant case because both cases were tort actions involving completed vessels and neither involved a contract to construct a vessel. Consequently, no conflict of any sort exists between *McCarthy* and *Burks* and the case at bar.

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1. *E.g.*, *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 851 (11th Cir. 1988); *Nilo Barge Line, Inc. v. M/V Bayou DuLarge*, 584 F.2d 841, 843 (8th Cir. 1978); *Boat La Sambra v. Lewis*, 321 F.2d 29, 30-31 (9th Cir. 1963); *Hyundai Heavy Indus. Co., Ltd. v. M/V Saibos FDS*, 163 F. Supp. 2d 1307, 1312-14 (N.D. Ala. 2001); *Stephens Boat Co., Inc. v. Barge ORR 1*, 791 F. Supp. 145, 147 (E.D. La. 1992); *MacDougall's Cape Cod Marine Serv., Inc. v. One Christina 40 Foot Vessel*, 721 F. Supp. 374, 376 (D. Mass. 1989); *Goudy & Stevens, Inc. v. Cable Marine, Inc.*, 665 F. Supp. 67, 69 (D. Me. 1987), *Bill Fowler, Inc. v. Stadler*, 558 F. Supp. 1115, 1117 (S.D. Fla. 1983); *General Engine & Mach. Works, Inc. v. Slay*, 222 F. Supp. 745, 747-48 (S.D. Ala. 1963).

B. The Eleventh Circuit Correctly Applied This Court's Longstanding Precedent That a Contract Related to the Construction of a Vessel Is Nonmaritime

The petition nonetheless asserts that in addition to an ostensible conflict with the Second and Fifth Circuits, the Eleventh Circuit actually misapplied this Court's precedent because the *Thames* doctrine has never been applied to "third parties, such as Broward Yachts, whose rights do not arise from a construction contract." (Pet. at 8.)

However, the undisputed findings of fact below show that Broward Yachts is not a mere disinterested third party. Indeed, the entire basis for Broward Yacht's assertion of a maritime lien on the Destiny Hull is the license agreement in which it agreed "to permit Destiny to continue manufacturing the Destiny Hull on Broward Yachts' premises." (Pet'r's App. at A8). If "the settled rule is that a contract for the complete construction of a ship or supplying materials therefor is nonmaritime, and not within the admiralty jurisdiction," *Thames*, 254 U.S. at 243, then certainly a contract to supply the premises for construction of a ship is nonmaritime.

This conclusion is borne out by the decisions of circuit courts applying *Thames*. In *Boat La Sambra v. Lewis*, 321 F.2d 29 (9th Cir. 1963), the plaintiffs in separate suits sought to enforce maritime liens against two boats based on agreements to furnish a ship-to-shore radio to one and an automatic pilot to the other. *Id.* at 29. The Ninth Circuit panel found that both accessories constituted original equipment, became an integral part of the boats, were purchased before the boats were ever used, and were installed when the boats

were still undelivered and at the dealer's premises. *Id.* at 31. The court held that neither case fell with the district court's admiralty jurisdiction because "the contracts for this equipment and its installation related to [the boats'] original construction," and thus fell within the rule in *Thames*. *Id.* at 29, 31.

Similarly, in *Nilo Barge Line, Inc. v. M/V Bayou DuLarge*, 584 F.2d 841 (8th Cir. 1978), the plaintiff brought an *in rem* action against a vessel pursuant to an agreement to lease electronic navigational equipment, which had been installed on the vessel during its construction. *Id.* at 842. The lease had been assigned to the plaintiff by the original lessor, and the plaintiff sought to share in the proceeds of a marshal's sale of the vessel. *Id.* Observing that the plaintiff could not participate in the distribution of proceeds from the sale unless it established that a maritime lien attached to the leased equipment, the Eighth Circuit observed that "[i]t is well settled that a contract for building or supplying materials for the original construction and outfitting of a ship is not a maritime contract." *Id.* (citing *Roach v. Chapman*, 63 U.S. (22 How.) 129 (1859)). After discussing the *Thames* doctrine, the Eighth Circuit panel held that "[t]he facts of this case fit squarely within this doctrine." *Id.* at 843.

Accordingly, this Court's precedent, stretching from *Beers* to *Thames* and beyond, and applied by the circuits, has established the bedrock proposition that any contract *relating to* the construction of a vessel — not merely a contract *for* construction of a vessel, as the petition erroneously suggests — is not a maritime contract and does not come within the admiralty jurisdiction of federal courts. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 n.7 (1986) ("[C]ontracts *relating to* the

construction of or supply of materials to a ship are not within the admiralty jurisdiction.") (emphasis added). The licensing agreement here expressly provided that Broward Yachts was leasing its facility "to permit Destiny to *continue manufacturing* the Destiny Hull." (Pet'r's App. at A8) (emphasis added). Such an agreement is inarguably a contract relating to the construction of a vessel and is therefore not a maritime contract.

C. Even If Broward Yachts Supplied "Necessaries" to the Destiny Hull, the Eleventh Circuit Correctly Decided that a Maritime Lien Did Not Attach Because the Hull Was Not Yet a "Vessel"

The petition further contends that because 46 U.S.C. § 31342 provides that a person who supplies "necessaries to a vessel" has a maritime lien on the vessel, and because "necessaries" is defined to include "repairs, supplies, towage, and the use of a dry dock or marine railway," *id.* § 31342(4), Broward Yachts has a maritime lien because it provided "storage and wharfage" for the Destiny Hull. (Pet. at 9.) However, the petition simply assumes the major premise that the Destiny Hull is in fact a "vessel." As discussed *supra*, the Destiny Hull was not a "vessel" because a "structure does not become a ship, in the legal sense, until it is completed and launched," *North Pacific S.S. v. Hall Bros. Marine Ry.*, 249 U.S. 119, 127 (1919), and is not "completed" until it is "sufficiently advanced to discharge the functions for which intended" and in a "condition to function as intended." *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242, 243, 245 (1920).

The petition then attempts to quibble with this Court's longstanding precedent by pointing out that the Destiny Hull

had been floated on navigable waters to the Broward Yachts facility, and that by "taking the Eleventh Circuit's reasoning to is logical conclusion," a ship designed to be fitted with a crane to fulfill its intended purpose that has sailed across the Atlantic to have the crane installed would not be a "vessel" for the purposes of admiralty jurisdiction. (Pet. at 9.) Whether the Eleventh Circuit or this Court would find as much upon such facts is open to debate, but it is clear that the actual facts here fit well within those in *Thames*.

In *Thames*, a shipbuilding company began construction of the subject schooner in Groton, Connecticut, and launched the hull. 252 U.S. at 243. However, the company was unable to continue with construction. *Id.* The claimant, a second shipbuilding company, agreed with the owner to complete construction at its yard in New London, Connecticut, to which the hull was towed. *Id.* Seeking to recover for the materials, labor, and work supplied, the claimant argued to this Court that because the contract was one for work and material to finish a vessel after it had been launched and was water-borne, it was within federal admiralty jurisdiction. *Id.* at 243-44. Rejecting the claimant's argument, the Court held that the same reasons which exclude contracts to construct entirely new ships "likewise apply to agreements made *after the hull is in the water*, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended." *Id.* at 244 (emphasis added).

Just as in *Thames*, where the fact that the hull had been towed from Groton to New London did not convert a contract to provide work and material to the hull into a maritime contract, the fact that the Destiny Hull here was floated six miles on navigable waters to the Broward Yachts facility also

does not convert the license agreement into a maritime contract. Because the license agreement was expressly made for the purpose of permitting the continued manufacture of the Destiny Hull, it is an agreement related to the construction of a vessel and, therefore, nonmaritime. Accordingly, the decision by the Eleventh Circuit below was completely consistent with *Thames* and those decisions of other circuits applying the doctrine set forth therein.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the petition.

Respectfully submitted,

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(3)

No. 04-489

IN THE

Supreme Court of the United States

BROWARD YACHTS INC., A FLORIDA CORPORATION,
Petitioner,

v.

THE VESSEL, KNOWN AS DESTINY HULL NO.104, ITS ENGINES, TACKLE, FURNITURE, APPAREL, GEAR, EQUIPMENT, AND ALL OTHER THINGS THEREUNTO APPERTAINING AND BELONGING, *IN REM*, AND SEAGROVE TRADING, INC., A DELAWARE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Eleventh Circuit's decision conflicts with at least two precedents from other Circuits broadly interpreting the definition of what constitutes a "vessel" for purposes of admiralty jurisdiction.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari demonstrates why the Petition should be granted because it underscores the confusion among the Circuit Courts surrounding the definition of the term "vessel" as defined by 1 U.S.C. § 3, and the resulting application of admiralty jurisdiction.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM A NUMBER OF OTHER CIRCUIT COURTS OF APPEALS INTERPRETING 1 U.S.C. § 3.

A. The Court Can Grant the Petition Even though the Opinion Below Is Unpublished.

Respondent Seagrove Trading, Inc. ("Seagrove") first asserts that there are no "compelling reasons" for granting certiorari in this matter because the opinion below is unpublished. The fact that the opinion below is unpublished is not a basis for denying a petition for writ of certiorari. *See, e.g., Burlington Northern R. Co. v. Oklahoma Tax Com'n,* 481 U.S. 454, 460 (1987)(granting certiorari to review unpublished decision in order to resolve conflict between Circuits).

B. Seagrove's Reliance On Cases Interpreting Non-Maritime Vessel Construction Contracts Is Misplaced.

Seagrove next claims there is no conflict between Circuit decisions and no admiralty jurisdiction over Broward Yachts' maritime lien for vessel storage because the yacht was under construction. Broward Yachts never

has disputed the well-settled principle that a contract to construct a vessel is outside of admiralty jurisdiction. This principle, however, is not at issue here. The issue in this case is whether there is admiralty jurisdiction over a maritime lien for storing an uncompleted yacht when the uncompleted yacht already has traversed navigable waters and, therefore, satisfies the definition of "vessel" contained in 1 U.S.C. § 3, because it is a "watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

The cases cited by Seagrove uniformly involve claimants who were parties to contracts to construct a vessel.[1] The rationale for excluding these cases from admiralty jurisdiction is that *the future existence of the vessel is contingent upon the performance of the contract. See Hatteras of Lauderdale, Inc. v. Gemini Lady, 853 F.2d 848, 850 (11th Cir. 1988)(citing The Manhattan, 46 F. 797, 799-800 (D.Wash.1891).* Unlike the cases cited by Seagrove, however, Broward Yachts was not a party to the contract to construct the vessel. Instead, it simply provided vessel storage – which long has been regarded as a "traditional maritime activity" and the source of a valid maritime lien. *See, e.g., Sisson v. Ruby*, 497 U.S. 358 (1990). In short, the future existence of the yacht was not contingent upon Broward Yachts at all.

C. The Legal Status Of The Yacht Is Indistinguishable From The Vessels At Issue In *McCarthy* And *Burks*.

None of the cases cited by Seagrove discuss the interpretation of the statute upon which Broward Yachts' seeks this Court's certiorari jurisdiction, *i.e.*, 1 U.S.C. §3. Similarly, none of Seagrove's cases involve a

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[1] *See, e.g., East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *The Jack-O-Lantern et al v. Purdy*, 258 U.S. 96 (1922); *The Winnebago*, 205 U.S. 354 (1907); *Edwards v. Elliot*, 88 U.S. 532 (1874); *Roach & Dennis Long, et al. v. William Chapman & Others, et al.*, 63 U.S. 129 (1859); *People's Ferry Co. of Boston, et al. v. Joseph Beers, et al.*, 61 U.S. 393 (1857).

situation – such as the one at issue here – where the object in question has traversed navigable waters. Thus, Seagrove fails to credibly explain how the museum piece in *McCarthy v. the Bark Peking*, 716 F.2d 130 (2nd Cir. 1983) and the derelict barge in *Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir. 1982) constituted "vessels" for purposes of 1 U.S.C. §3 because they were *capable of being towed in navigation*, but a 104-foot mega-yacht which *already has been towed in navigation* is not a "vessel."

Instead, Seagrove attempts to dismiss *McCarthy* and *Burks* on the grounds that these cases involve maritime torts as opposed to maritime contracts. This distinction is irrelevant. Broward Yachts relies on *McCarthy* and *Burks* for their reasoning that a derelict hull *capable of being towed in navigation* satisfies the definition of "vessel" under 1 U.S.C. § 3. The nature of the underlying actions in those cases has nothing to do with the vessel's status.

Seagrove next asserts that the objects at issue in *McCarthy* and *Burks* were "vessels" because they had been "launched and completed" based on this Court's test for assessing maritime construction contracts in *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242 (1920). This distinction equally is meritless. Launching and completion were not issues in either *McCarthy* or *Burks*. The primary issue in *McCarthy* and *Burks* was that the objects were *capable of being towed in navigation*. For example, the Second Circuit in *McCarthy* held that a derelict museum piece incapable of navigating on its own and which had not been in the water for over half-a-century satisfied the definition of "vessel" under 1 U.S.C. § 3, because there was a "hypothetically plausible possibility" of it being used as a means of transportation over water. *McCarthy*, 716 F.2d at 134. The Fifth Circuit adopted an equally expansive interpretation of 1 U.S.C. § 3 in *Burks*, holding that an unpowered barge was a "vessel" and noting that even "three men in a tub" could constitute a vessel. *See Burks*, 679 F.2d at 75.

Seagrove's reliance on the "launched and completed" test is misplaced. In fact, even the cases on which Seagrove relies hold that the "launched and completed" test is limited to contracts concerning the construction and repair of a vessel:

> The *Francis McDonald* rule is merely a "boundary point" to be heeded in distinguishing a contract to construct a vessel from one to repair a vessel; "*completion" is not a universal test of vessel status applicable in whatever context admiralty jurisdiction may be questioned.* Thus, for example, a partially constructed casino boat may be a vessel for purposes of admiralty jurisdiction in tort even though it would not be a "completed" vessel for purposes of a breach of contract action by the builder. *Nor does the "launched and completed" test necessarily apply to any species of contract other than one to construct or repair a vessel.*

Hyundai Heavy Indus. Co., Ltd. v. M/V Saibos, FDS, 163 F.Supp.2d 1307, 1315 (N.D. Ala. 2001)(citations omitted, emphasis added).

Seagrove's seemingly black-and-white interpretation of admiralty jurisdiction is not supported by any authority. There are no cases holding that the "launched and completed" test applies to a third-party whose rights do not flow from a contract to construct a vessel. Accordingly, the "launched and completed" test simply has no application here, and the status of the yacht is legally indistinguishable from the vessels at issue is *McCarthy* and *Burks*.

D. Broward Yacht's Contract to Store the Yacht Cannot be Transformed into a Non-Maritime Construction Contract.

Lacking any support for the argument that the 1 U.S.C. § 3 does not apply, Seagrove next attempts to transform Broward Yachts' agreement to provide vessel storage into a vessel construction contract. In support of this novel argument, Seagrove relies on *Nilo Barge Line, Inc. v. M/V Bayou DuLarge*, 584 F.2d 841 (8th Cir. 1978) and *Boat La Sambra v. Lewis*, 321 F.2d 29 (9th Cir. 1963). As with the other cases cited by Seagrove, however, these cases simply stand for the well established proposition that a contract to construct a vessel is not maritime. In both of these cases, the claimants provided navigational or electronic components for a newly constructed vessel and sued to recover payment for providing the

equipment. Neither case concerns vessel storage, discusses 1 U.S.C. § 3 or addresses objects that had traversed navigable waters.[2]

Nevertheless, even if Seagrove's argument has merit – which is denied – the agreement to store the yacht cannot properly be considered to be a vessel construction contract. As seen above, the future existence of the yacht was not contingent upon Broward Yachts performance. The fallacyof Seagrove's argument is underscored by the fact that had Broward Yachts failed to perform its contractual obligations to store the vessel: (1) the yacht still would exist and (2) Seagrove would have no right to sue Broward Yachts for failing to complete construction of the yacht.

There is no credible dispute that the yacht traversed navigable waters and that it is a "watercraft or contrivance capable of being used as a means of transportation on water." Accordingly, the yacht satisfies the definition of "vessel" set forth in 1 U.S.C. § 3, and as that term has been applied by the Second and Fifth Circuits. Consequently, Certiorari should be granted to resolve the conflict between the Eleventh Circuit's decision and the decisions of the Second and Fifth Circuit interpreting 1 U.S.C. § 3.

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[2] Ironically, the Eleventh Circuit – from which this Petition arises – previously applied admiralty jurisdiction to uncompleted vessels that had traversed navigable waters. *See, e.g., Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, Hull No. 01*, 625 F.2d 44, n.2 (5th Cir. 1980)(affirming -- in case decided before the Fifth Circuit split -- application of *in rem* admiralty jurisdiction to yacht that was not totally complete and which was out of the water when the action began because it had traversed navigable waters).

CONCLUSION

For the reasons discussed above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on behalf of Broward Yachts this 23 day of November 2004.

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